



# City of Memphis

Executive Summary 2016

 GRIFFIN &  
STRONG P.C.

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## INTRODUCTION

In June, 2015, the City of Memphis, Tennessee (“City”) contracted with Griffin & Strong, P.C. (“GSPC”) to review the attainment of minority and women owned businesses (“MWBEs”) in obtaining awards since the last disparity study was completed in 2010. The purpose for conducting such a review was to determine whether the purposes of the current Equal Business Opportunity (“EBO”) ordinance, that was set to expire on June 30, 2015, had likely been fulfilled or not. GSPC determined, after its review of the MWBE Attainment Summaries provided by the City and after conducting public hearings, that the purposes of the EBO Ordinance had not been fulfilled. It further recommended that the City extend the EBO Ordinance until an update to the 2010 Disparity Study could be completed (hereinafter referred to as “2016 Updated Disparity Study” or “Study”, the 2010 disparity study hereinafter referred to as “2010 Study”).

The current 2016 Updated Disparity Study and its 2010 predecessor were designed to determine whether existing City efforts have eliminated active or passive inferences of discrimination; to analyze the City’s procurement trends and practices for the previous five (5) year period; and to evaluate various options for future program development. Governmental entities, such as the City of Memphis, have authorized disparity studies in response to City of Richmond v. J.A. Croson Co.<sup>1</sup> and the cases which followed, to determine whether there has been a compelling interest for remedial procurement programs, based upon race, ethnicity, or gender. The City adopted its current MWBE program in 1995 as a result of the findings in the 1994 Disparity Study, conducted by D.J. Miller & Associates.

The purpose of this Study is to determine whether there is a disparity between the percentage of minority and women owned businesses (“MWBEs”) by industry in the Memphis marketplace and the percentage of dollars that Memphis paid to such MWBE firms during FY2010-FY2014 (“Study Period”), such that it could be inferred that the City is an active or passive participant in past or present discrimination.

The Study collected and analyzed relevant data on businesses in the industries of:

1. Construction Services
2. Architecture & Engineering (“A/E”)
3. Other Professional Services
4. Other Services
5. Goods

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<sup>1</sup> City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).





## OBJECTIVES

The principal objectives of this Study were:

- To determine whether the City, either in the past or currently, engages, or has been a passive participant in discriminatory practices in the solicitation and award of contracts, which, for the purposes of this Study have been categorized as Construction, Architecture and Engineering (“A/E”), Other Professional Services, Other Services, and Goods;
- To determine if a legally justified need continues to exist for any or all of the City’s MWBE programs in accordance with the guidelines set forth by the Supreme Court in Croson and relevant subsequent cases; and
- To recommend modifications to the City’s MWBE program based on the findings of this Study



## TECHNICAL APPROACH

In conducting this study and preparing our recommendations, GSPC followed a carefully designed work plan that allowed study team members to fully analyze availability, utilization, and disparity with regard to MWBE participation. The final work plan consisted of, but was not limited to, the following major tasks:

- establishing data parameters and finalizing a work plan;
- legal analysis;
- policy and procurement process review and remedial program analysis;
- collecting, organizing, and cleaning data;
- conducting market area analyses;
- conducting product market analysis;
- conducting utilization analyses;
- estimating the availability of qualified firms;
- analyzing the utilization and availability data for disparity and significance;
- conducting private sector analysis including credit and self-employment analysis;
- collecting and analyzing anecdotal information; and
- preparing a final report that presents race- and gender-neutral and narrowly tailored race- and gender-based remedies

## Meet OUR TEAM



Rodney K. Strong, Esq., CEO  
Dr. Gregory Price, Senior Economist  
Michele Clark Jenkins, J.D., Senior Director and Project Manager  
Imani Strong, Deputy Project Manager  
Tanesha Jones, Senior Data Analyst  
Felicia Loetscher, Data Analyst  
Susan G. Johnson, Project Administrator  
A. L. Burruss Institute of Public Service and Research at  
Kennesaw State University Surveys of Business Owners



## Memphis LOCAL PARTNERS

### McCULLOUGH LAW, PLLC

For Legal Review, Purchasing Practices Policies & Procedures, and Anecdotal Interviews



Trust Marketing & Communications  
For Public Relations and Community Outreach



Olympic Staffing-Data Entry

## About the PROJECT TEAM

**Griffin & Strong, P.C.** is a professional corporation based in Atlanta, Georgia, that is actively engaged in the practice of law, as well as governmental and private consulting. Since the firm's inception in 1992, the public policy consulting division has been continuously directed and controlled by Rodney K. Strong. Attorney Strong has an extensive background in the area of public contracting with specific experience conducting disparity studies. Gregory Price, Ph.D., served as Senior Economist for this Study and reviewed all quantitative aspects of the Study. Michele Clark Jenkins, as the Project Manager, was responsible for the day-to-day aspects of the Study and for executing the methodology. Mrs. Jenkins has extensive experience in managing disparity studies, bench-markings, and goal settings. Imani Strong served as Deputy Project Manager and qualitative research coordinator of the Study. Ms. Strong's expertise in anthropology and prior experience on GSPC studies made her an asset to the execution of this Study, particularly in the analysis of the anecdotal evidence. Susan Johnson handled the administration of the Study, particularly with regard to subcontractor tracking and payments.

## Legal basis for the Study

The City, through adoption of the City of Memphis' Equal Business Opportunity Program Ordinance (the "EBO" Program"), seeks to ensure that public contracting opportunities are not foreclosed to qualified and available minority and women owned businesses desiring to participate in City contracting opportunities. The current ordinance was set to sunset on June 30, 2015, but was extended by the Memphis City Council until September 30, 2016, after this Study is completed. If the 2016 Updated Study indicates an inference of discrimination and if a race- or gender-specific program is recommended, the continuation of the EBO Program, or any amended program, must meet the rigorous constitutional standards required for race- and gender-specific remedies. The current statement of policy of the EBO Program Ordinance evidences the City's strong commitment to its remedial nature: "Under all the circumstances and based on the factual predicate which has been established after careful study and review, the City of Memphis has a compelling interest to fully remedy the ongoing effects of past and present discrimination against minority and women business owners in both the public and private sectors of its marketplace." Memphis Code §Section 2-325(a).

In order to employ "race conscious" remedies to ensure equal opportunity, a municipality must comply with the constitutional requirements, standards and principles of law set forth by the Supreme Court in City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), 709 S.Ct. 706, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 115 S.Ct. 2097 (1995), and their progeny. The Croson decision represents the definitive legal precedent which established "strict scrutiny" as the standard of review by which courts evaluate state and local programs that grant or limit government opportunities based on race. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the federal government.



In rendering the Croson decision in January 1989, the U.S. Supreme Court held that the City of Richmond's minority business enterprise ordinance--which mandated that majority owned prime contractors, to whom the City of Richmond had awarded contracts, subcontract 30% of their construction dollars to minority owned subcontractors--violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. In a six-to-three majority decision, the Court held that state and local programs which use race conscious measures to allocate, or "set aside," a portion of public contracting exclusively to minority owned businesses must withstand a "strict scrutiny" standard of judicial review.

The courts clearly held that any race based program involving governmental procurement of goods and services is subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The strict scrutiny standard, the most stringent standard of judicial review used by the United States courts, is a two-pronged test: A "compelling governmental interest" must exist in remedying race discrimination by current "strong evidence" of the persistence of discrimination, and the program adopted must be "narrowly tailored" to remedy the identified discrimination.

While gender based programs have required the application of a lesser standard of review, "intermediate scrutiny," a few courts have lumped gender in with race and required a higher standard of review at the strict scrutiny level. Intermediate scrutiny requires: The program must serve an "important governmental objective," and the program must be "substantially related to the achievement of those objectives."



## SUMMARY

Despite the nearly twenty-six years of litigation following the Croson decision, the law in the area of race-conscious remedies used to ameliorate inequities concerning MWBE utilization in the area of public contracting, is far from settled. Clearly, the law requires that such programs be reviewed periodically. What remains unclear is the applicable standard used to determine whether a race- and gender-conscious program has achieved its intended goal of eliminating identified discrimination, thereby negating the need for the continued use of race- and gender-conscious remedies. In this study, the Griffin & Strong P.C. team analyzed the statistical data as extensively as possible and used the more conservative interpretations of availability which have been proffered by the most recent Court opinions. The quantitative data is buttressed with detailed and varied anecdotal evidence.

## FINDINGS AND RECCOMENDATIONS

The courts have indicated that for a race-based or gender-based preference program to be maintained there must be a clear evidentiary foundation established for the continuation of existing programs. As the detailed findings below will demonstrate, GSPC found sufficient statistically significant underutilization of minority and woman owned firms as prime contractors and some areas of subcontracting in all five (5) work categories that GSPC analyzed. A regression analysis was performed and found that there was evidence to indicate that the disparities were caused by the race, ethnicity, or gender status of the firm owners such that an inference of discrimination can be made. In addition, substantial anecdotal evidence supports the need to remedy the discrimination found.

### A. FINDINGS

#### ***FINDING 1: GEOGRAPHICAL RELEVANT MARKET***

The figure below summarizes the geographical area where at least 75% of prime payees were located in each industry. In analyzing the relevant market data, GSPC tabulated the percentage of dollars spent, beginning with the City of Memphis (by zip codes). GSPC continued counting in radius surrounding the City of Memphis until the cumulative percentage was equal to or greater than 75%. The availability and utilization analyses were conducted only on firms with offices within the geographical markets. The results were as follows:

**Figure 1: Summary of Relevant Geographic Market (by payments)**



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#### ***FINDING 2: AWARD THRESHOLDS***

GSPC reviewed the level of contracting undertaken by the City at various dollar thresholds in order to determine whether it was likely that all firms in its Master Vendor File could perform as primes. GSPC found that 76.37% of all of the City's prime contracts were under \$100,000. In addition, the average contract was \$208,612 and the median contract was \$30,660. Small contract sizing would likely allow all firms on GSPC's Master Vendor File to perform as prime contractors for the City.



**Table 1: Summary of Contract Award Thresholds for FY2010-FY2014**

<b>AWARD THRESHOLD</b>	<b>NUMBER OF AWARDS</b>	<b>PERCENT OF AWARDS</b>	<b>DOLLARS</b>
<b>5,000 TO 10,000</b>	<b>625</b>	<b>14.24%</b>	<b>\$4,590,817</b>
<b>10,000 TO 25,000</b>	<b>1210</b>	<b>27.57%</b>	<b>\$20,014,488</b>
<b>25,000 TO 50,000</b>	<b>1042</b>	<b>23.74%</b>	<b>\$38,250,953</b>
<b>50,000 TO 100,000</b>	<b>475</b>	<b>10.82%</b>	<b>\$33,696,475</b>
<b>100,000 TO 500,000</b>	<b>731</b>	<b>16.66%</b>	<b>\$160,504,106</b>
<b>500,000 TO 1,000,000</b>	<b>148</b>	<b>3.37%</b>	<b>\$101,269,300</b>
<b>1,000,000 TO 1,500,000</b>	<b>43</b>	<b>0.98%</b>	<b>\$51,486,390</b>
<b>1,500,000 TO 2,000,000</b>	<b>31</b>	<b>0.71%</b>	<b>\$52,430,798</b>
<b>2,000,000 TO 2,500,000</b>	<b>17</b>	<b>0.39%</b>	<b>\$37,112,147</b>
<b>2,500,000 TO 5,000,000</b>	<b>41</b>	<b>0.93%</b>	<b>\$139,839,390</b>
<b>OVER 5,000,000</b>	<b>26</b>	<b>0.59%</b>	<b>\$276,404,717</b>
<b>TOTAL</b>	<b>4389</b>	<b>100.00%</b>	<b>\$915,599,582</b>

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### **FINDING 3: OVERALL MWBE UTILIZATION**

As the table below shows, the City of Memphis spent a total of \$663,947,876 in prime spending in the relevant market during the study period and \$42,889,746 of this amount, or 6.46% of this amount was spent with MWBE fir as prime contractors.

**Table 2: Summary of Prime Utilization for FY2010-FY2014**  
By Dollars in the Relevant Markets

Memphis Disparity Study Utilization Totals						
	Construction	Architecture and Engineering	Other Professional Services	Other Services	Goods	Totals
Prime						
African American	\$3,988,795	\$854,829	\$6,510,832	\$6,130,614	\$2,746,866	\$20,231,936
Asian American	\$0	\$136,145	\$84,280	\$14,836	\$146,075	\$381,336
Hispanic American	\$0	\$0	\$54,985	\$0	\$737,111	\$792,096
Native American	\$0	\$0	\$0	\$0	\$0	\$0
Women	\$7,949,990	\$154,164	\$8,993,341	\$2,094,526	\$2,274,497	\$21,466,518
MBE	\$0	\$0	\$17,860	\$0	\$0	\$17,860
Total MWBE/DBE	\$11,938,785	\$1,145,138	\$15,661,298	\$8,239,976	\$5,904,549	\$42,889,746
Non-MWBE/DBE	\$202,065,342	\$18,740,036	\$131,280,044	\$73,174,489	\$185,798,219	\$611,058,130
Total	\$214,004,127	\$19,885,174	\$146,941,342	\$81,414,465	\$191,702,768	\$653,947,876

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### **FINDING 4: COMPARISON TO 2010 DISPARITY ANALYSIS**

In comparing the disparity analysis from the 2010 Study to the current study, GSPC found the following:

In Construction, the MWBE utilization dropped from 9.59% to 5.58%, however availability substantially increased from 18.64% to 33.41%. Overall the MWBE disparity index dropped from .51 to .17.<sup>2</sup>

In A/E, the MWBE utilization decreased from 11.69% to 5.76%, but availability increased from 28.57 to 39.37%. Overall the MWBE disparity index dropped from .41 to .15

In Other Professional Services, the MWBE utilization increased from 3.12% to 10.66% and availability increased from 14.14% to 35.13%. Overall the MWBE disparity index increased from .22 to .30.

In Other Services, MWBE utilization decreased from 11.42% to 10.12% and availability decreased from 25.39% to 24.10%. Overall the MWBE disparity index decreases from .45 to .42.

In Goods, MWBE utilization decreased from 13.85% to 3.08%, however availability increased from 13.85% to 20.55%. Overall the MWBE disparity index dropped from .43 to .15

Except for Other Professional Services where there has been a greater relative utilization of MWBE firms, relative utilization (relative to availability) has decreased in all other work categories since the 2010 Study for FY2003-FY2008.

<sup>2</sup> The further the disparity index is from 1.00, the greater the disparity.

**Table 3: Comparison of Disparity Analysis of Current Study to 2010 Study**  
Memphis Disparity Study

ETHNICITY/RACE AND GENDER GROUP	2016 DISPARITY STUDY PRIME UTILIZATION % (U1)	2016 DISPARITY STUDY PRIME AVAILABILITY % (AMV1)	DISPARITY INDEX (U1/AMV1)	2010 DISPARITY STUDY PRIME UTILIZATION % (U2)	2010 DISPARITY STUDY PRIME AVAILABILITY % (AMV2)	DISPARITY INDEX (U2/AMV2)
<b>TOTAL CONSTRUCTION</b>						
AFRICAN AMERICAN	1.86%	23.66%	0.08	8.35%	15.17%	0.55
ASIAN AMERICAN	0.00%	1.07%	0.00	0.00%	0.29%	0.00
HISPANIC AMERICAN	0.00%	0.95%	0.00	0.00%	0.00%	-
NATIVE AMERICAN	0.00%	0.48%	0.00	0.00%	0.00%	-
WOMEN	3.71%	7.02%	0.53	1.24%	3.18%	0.39
MBE	0.00%	0.24%	0.00	-	-	-
TOTAL MWBE	5.58%	33.41%	0.17	9.59%	18.64%	0.51
NON-MWBE	94.42%	66.59%	1.42	90.41%	81.36%	1.11
<b>TOTAL A/E</b>						
AFRICAN AMERICAN	4.30%	14.44%	0.30	10.61%	18.49%	0.57
ASIAN AMERICAN	0.68%	4.20%	0.16	0.00%	0.84%	0.00
HISPANIC AMERICAN	0.00%	0.26%	0.00	0.00%	2.52%	0.00
NATIVE AMERICAN	0.00%	0.52%	0.00	0.00%	0.00%	-
WOMEN	0.78%	19.95%	0.04	1.08%	6.72%	0.16
MBE	0.00%	0.00%	-	-	-	-
TOTAL MWBE	5.76%	39.37%	0.15	11.69%	28.57%	0.41
NON-MWBE	94.24%	60.63%	1.55	88.31%	71.43%	1.24
<b>TOTAL OTHER PROFESSIONAL SERVICES</b>						
AFRICAN AMERICAN	4.43%	22.64%	0.20	3.09%	12.03%	0.26
ASIAN AMERICAN	0.06%	1.62%	0.04	0.00%	0.47%	0.00
HISPANIC AMERICAN	0.04%	0.91%	0.04	0.00%	0.12%	0.00
NATIVE AMERICAN	0.00%	0.20%	0.00	0.00%	0.00%	-
WOMEN	6.12%	9.44%	0.65	0.03%	1.52%	0.02
MBE	0.01%	0.30%	0.03	-	-	-
TOTAL MWBE	10.66%	35.13%	0.30	3.12%	14.14%	0.22
NON-MWBE	89.34%	64.87%	1.38	96.88%	85.86%	1.13
<b>TOTAL OTHER SERVICES</b>						
AFRICAN AMERICAN	7.53%	14.30%	0.53	11.24%	22.90%	0.49
ASIAN AMERICAN	0.02%	0.94%	0.02	0.00%	0.11%	0.00
HISPANIC AMERICAN	0.00%	0.70%	0.00	0.00%	0.22%	0.00
NATIVE AMERICAN	0.00%	0.17%	0.00	0.00%	0.04%	0.00
WOMEN	2.57%	7.88%	0.33	0.18%	2.13%	0.08
MBE	0.00%	0.11%	0.00	-	-	-
TOTAL MWBE	10.12%	24.10%	0.42	11.42%	25.39%	0.45
NON-MWBE	89.88%	75.90%	1.18	88.56%	74.61%	1.19
<b>TOTAL GOODS</b>						
AFRICAN AMERICAN	1.43%	9.33%	0.15	4.88%	12.20%	0.40
ASIAN AMERICAN	0.08%	0.92%	0.09	0.00%	0.15%	0.00
HISPANIC AMERICAN	0.38%	0.65%	0.58	0.00%	0.00%	-
NATIVE AMERICAN	0.00%	0.11%	0.00	0.01%	0.05%	0.20
WOMEN	1.19%	9.49%	0.13	1.13%	1.45%	0.78
MBE	0.00%	0.05%	0.00	-	-	-
TOTAL MWBE	3.08%	20.55%	0.15	6.02%	13.85%	0.43
NON-MWBE	96.92%	79.45%	1.22	93.98%	86.15%	1.09

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## **FINDING 5: SUMMARY OF DISPARITY ANALYSIS FOR FY2010-FY2014**

The tables below indicate those MWBE groups where a statistically significant disparity was found.

**Table 4: Summary of Disparity Analysis of MWBEs in Prime Contracting**  
City of Memphis Disparity Study

	Construction	A & E	Other Professional Services	Other Services	Goods
African American	✓	✓	✓	✓	✓
Asian American	✓	✓	✓	✓	✓
Hispanic American	✓	✓	✓	✓	✓
Native American	✓	✓	✓	✓	✓
Woman	✓	✓	✓	✓	✓

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**Table 5: Summary of Disparity Analysis of MWBEs in Subcontracting**

(From Prime Vendor Questionnaire Sample)

CONSTRUCTION	A/E
African American owned- Overutilized	African American owned- Overutilized
Asian American owned – Underutilized (Not Statistically Significant)	Asian American owned – Underutilized
Hispanic American owned - Underutilized	Hispanic American owned - Underutilized
Native American owned - Underutilized	Native American owned - Underutilized
Women owned- Underutilized (Not Statistically Significant)	Women owned- Underutilized
Non-MWBE – Underutilized (Not Statistically Significant)	Non-MWBE – Overutilized

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## **FINDING 6: PRIVATE SECTOR DISCRIMINATION**

Our analysis explicitly links a business firm owner's race/ethnicity/gender to public contracting outcomes in the City of Memphis relevant market area. Indeed, our results suggest that in general, a firm owner's race, ethnicity, and gender have, in several instances a statistically significant and adverse effect on entering the Memphis market area as a new firm, and for firms in general, and those in Construction Services, securing public contracting and subcontracting opportunities relative to non-minority owned firms. Our results also suggest that at least with respect to African American owned firms, the City of Memphis may be a passive participant in private discrimination, as African American owned firms are more likely to report financing—which is typically secure in private credit markets—to be a barrier to securing contracts with the City of Memphis.

Specifically, GSPC found that:

- MWBEs are **EQUALLY LIKELY AS** non-MWBEs to submit bids
- MWBEs are **LESS LIKELY THAN** non-MWBEs to have revenues that equal or exceed their market representation
- African Americans and Women owned firms are **MORE LIKELY THAN** non-MWBEs to be new entrants to the Memphis market
- Certified African American and Women owned firms have benefitted from the City's remedial programs and Hispanic and Native American owned firms did not benefit accordingly.
- African American owned firms are **MORE LIKELY THAN** non-MWBEs to face financing barriers
- African American owned firms are **MORE LIKELY THAN** non-MWBEs to perceive that the bidding process is unfair.

## **FINDING 7: PERCEPTIONS OF INFORMAL NETWORKS**

We also found, in our private sector analysis, that being an African American owned firm increases the likelihood of having a perception that the process by which bids are selected by the City of Memphis is not fair and transparent, perceived to be governed by biased informal networks, which could discourage participation from minority owned firms in the public contracting process—exacerbating racial/ethnic/gender disparities in public contracting outcomes for the City of Memphis.

One of the overarching themes throughout the anecdotal evidence is the perceived discretion in the procurement process, which is seen as a barrier to entry to contracting with the City as well as one of the factors that makes it difficult to appeal or contest an award. GSPC's research team heard repeatedly that Memphis business owners have had experiences with an informal network either within the City or in doing business with prime contractors as a subcontractor. Many of the MWBE's who came forward in the public hearing or were interviewed expressed a strong opinion that there would be little participation if goals were not in place—essentially that majority contractors must be required to work with minority and women owned businesses.





#### **FINDING 8: ANECDOTAL FINDINGS**

GSPC heard consistently in its anecdotal analysis that the continued vestiges and current practice of social segregation have led to the creation of exclusive informal business networks which disadvantage MWBEs. Additionally, the lack of exposure to minority and women owned businesses has created a perception of limited capacity of those firms by non-MWBE owned firms and financial institutions. GSPC heard extensively that certification costs and the lack of cohesion in the process has been a barrier to full participation by MWBE firms. There was discussion in multiple forums regarding the prevalence of “fronts”: firms professing to be owned by an MWBE but are in fact owned and/or operated by a non-MWBE. GSPC received substantial anecdotal evidence that suggests that the goal setting process by the City needs to be carefully reviewed and calibrated to reflect the availability in the marketplace. Finally, there were numerous comments regarding onerous insurance requirements and a need for prompt payment.

#### **FINDING 9: INEFFICIENT CERTIFICATION**

From its information-gathering efforts through informational meetings, public hearings, focus groups, anecdotal interviews and email comments, Griffin & Strong, P.C. has discovered that MWBE firms and non-MWBE firms alike are concerned about the program, either from an administrative, contract-letting standpoint or in its monitoring of MWBE certifications and the goal-setting process. The certification process itself was also a cause for concern, with some participants intimating that their information was used inappropriately and several others indicating that the process is not widespread or efficient enough to capture the entire universe of MWBE-eligible firms in the Memphis marketplace

The City accepts various certifications from UCA, TMSDC, and WBENC. Each agency charges approximately \$300 for certification. Vendors have consistently complained about the fee charged and application process. The MWBEs and LOSBs have expressed that they have to pay to do business with the City under the various programs while majority owned companies do not have pay. The application process has been described as invasive and intrusive by MWBEs and LOSBs. There has been a constant concern of breaches of privacy as it relates to their information supplied to the various agencies. The perceived breach is not on the side of City as the City receives no financial data regarding the applicant. The LOSB is not

race based as requires all applicants to provide the requested financial data. So majority owned companies are required to submit finances to participate as well.



#### **FINDING 9: GOAL-SETTING**

There was some consensus throughout the various forums that the MWBE program's oversight of contracts and goal setting mechanisms was a mystery to many members of the public, including those present at the informational meeting and there was a request for more transparency in the goal-setting process. *In addition, there is an impression among many of those who provided comment that the program may be revamped to include more mentoring aspects for smaller firms to build capacity.*

#### **FINDING 10: BONDING THRESHOLDS AND INSURANCE REQUIREMENTS**

Construction projects with an estimated cost of \$100,000 or more generally require a bid bond at 5% of the bid amount. While on its face, a 5% bid bond may not appear to be excessive. However small, minority and women owned businesses can rarely afford to pull much needed money from their businesses for the bond. As a result, these businesses are placed in the unenviable position of serving in the consistent role of subcontractor rather than the prime position. Although the company may have the skills, licenses and experience to perform as a prime, finance is a major factor keeping them in the subcontractor role.

When a company wins a construction bid with the City, shortly thereafter a performance bond in the amount equal to the dollar value of the project is required. The ability to obtain a bond is based on experience, reputation, financial capability, and equipment readiness to name a few expectations. Finance is consistently a problem for small, minority and women owned businesses. While it is understandable the City has to balance the fiscal responsibility due taxpayers. It is also important to take into consideration other less burdensome options that can accomplish the same goal.

City insurance levels include \$2,000,000 for professional liability and commercial general liability of \$1,000,000, to identify a few. Vendors have consistently complained about the perceived high levels of

insurance required to do business with the City. Although each contract should be reviewed to establish the appropriate insurance limits, in practice rarely are insurance levels lowered.

#### **FINDING 11: LACK OF KNOWLEDGE OF RESOURCES**

The City provides a wealth of services to all citizens including MWBEs through the Renaissance Business Center. The center offers construction licensing, low interest loans, and financial statement preparation instruction. With all of these resources, many in the community are unaware of the center and its many offerings. Marketing resources have not been deployed in a meaningful way to spread the word about the opportunities presented. With direct loan capabilities, many in the business community could benefit if they were aware of the assistance.

#### **FINDING 12: ADMINISTRATIVE AUTHORITY AND THE CONTRACT COMPLIANCE OFFICER (CCO)**

The EBO Program is clear in its designation and description of the CCO as being charged with oversight of MWBE issue, concerns, information distribution, etc. The CCO, in conjunction with the division of finance, is specifically charged with providing MWBEs with information and assistance regarding city contracting opportunities. In an effort to increase the attention given to small, minority and women owned businesses, oversight boards and other entities have been created. However, there needs to be more hands on deck to support contract compliance rather than pulling the office in several directions. The office of MORE should report to the Contract Compliance Office rather than be separate and apart. Two offices with a similar focus provides confusion in the marketplace.

While MORE is a good idea, there are no measurable provided to the office to determine its effectiveness. MORE is tasked with providing MWBEs with information regarding city contracting opportunities, although the ordinance clearly states this is a part of the CCO duties. This consistently adds to MWBE confusion as to where to go for information or assistance.

The accomplishment or lack thereof of goals and the “numbers” are placed squarely at the feet of the CCO. Therefore, the CCO should be able to direct the resources and assignments of MORE to better assistance MWBEs as is clearly detailed in the EBO ordinance. However clearly defining the scope of services of MORE can also solve the problem so that there is no overlap in responsibilities between MORE and Contract Compliance (CC). Business development may be a great position for MORE if it is to remain separate and apart from CC.



## B. RECOMMENDATIONS

The 2016 City of Memphis Disparity Study is the second Disparity Study conducted for the City of Memphis by Griffin & Strong, P.C. Our firm also conducted the 2010 study for the City. We made a number of recommendations as a result of that study, many of which were not fully implemented during the intervening period. As demonstrated by the findings above, we have determined that the City of Memphis has a compelling governmental interest in the continuation of an EBO Program. We have included a copy of the recommendations made in the 2010 study as Appendix G to this report, and we continue to believe that many of those recommendations would be beneficial for the City to implement.

In making our specific recommendations with regard to ameliorating the findings of this study, we are not seeking to give our opinion with regard to the specific recommendations of either of the three entities mentioned at the beginning of this chapter (MBDOC, Mayor's Transition Team, and City Council's Minority Business Task Force) with whom we have interacted. The recommendations we make below reflect what we believe to be the critical issues which must be addressed in order for the program to achieve its objectives.

It should be noted that the newly appointed Office of Business Diversity and Compliance has already begun to make substantial operational, administrative, and programmatic changes, including some of the ones recommended by GSPC below.

### RECOMMENDATION 1: MWBE GOALS

The findings of this study indicate that the City of Memphis should continue to implement a program to promote MWBE utilization.

1. The annual goalsetting process the City has engaged in under the current program should be continued. The benchmarks for goalsetting should be based on relative MWBE availability as determined in this study.
2. Based on the decline in MWBE participation during the study period, described in Finding 2 above, the City is justified in taking a granular approach to goalsetting. We therefore recommend goals tied both to procurement categories and to the projected spend of each division or department of City government. Goals should be set for both prime and subcontracting. In addition, there should continue to be project specific goals set by the goalsetting committee.
3. The City should also consider encouraging joint ventures on the prime contracting level as part of an enhanced MWBE program.
4. Finally, the City should develop a process to ensure the participation of MWBE firms in nontraditional areas, including financial services, pension investment management and real estate investment and management.



## RECOMMENDATION 2: DEVELOP MWBE SPENDING PLAN

The City should consider reviewing all of its anticipated expenditures for each upcoming fiscal year as part of its budget approval process, based on the anticipated expenditures of each department. MWBE spending targets could be set based on MWBE availability to perform the work anticipated on various projects. Anticipated expenditures could be made public as a forecast which would allow MWBE firms to understand early on what projects are anticipated in the coming fiscal year and to prepare to compete for them.

## RECOMMENDATION 3: PERFORMANCE STANDARDS FOR STAFF

The City should consider evaluating all employees with procurement authority based on their efforts and results in utilizing MWBEs as part of their annual performance reviews.

## RECOMMENDATION 4: PERFORMANCE STANDARDS FOR MANAGEMENT

Every department head should be trained on the MWBE program and the department heads should ensure that every individual with any procurement authorization within their department is also trained. Part of the performance review of department heads should be their effort and results with regard to MWBE participation.

## RECOMMENDATION 5: CONTINUED ENHANCEMENT OF THE OFFICE OF BUSINESS DIVERSITY AND COMPLIANCE

Recent Changes-The Strickland Administration has enhanced what was formerly the Office of Contract Compliance by creating a new Office of Business Diversity and Compliance, combining staffs of both the Office of Contract Compliance and MORE (Memphis Office of Resources and Enterprise), elevating the leader of the organization to the Director level and having her report directly to the Chief Financial Officer. This has resulted in substantial improvements.

Additional Changes Needed—We recommend that control of the Renaissance Business Center be consolidated under the Office of Business Diversity and Contract Compliance.

Adequate Staffing-- We recommend that adequate staff be put in place to allow for effective contract administration of all City divisions', departments' and agencies' procurements. The City should also ensure that adequate staff is in place to do effective monitoring of all contracts that are in progress.

## RECOMMENDATION 6: CERTIFICATION ISSUES

One of the biggest issues facing the City is the lack of a public certification process. We recommend that the City take complete control of its certification process. The City may choose to outsource some of the functions associated with certification or to provide those services in house. Regardless, the City must have complete control of the list of firms considered to be certified for purposes of doing business with the City of Memphis which take advantage of opportunities provided by the Office of Business Diversity and Contract Compliance. The ultimate certification decision should be made by the Director of the Office of

## Business Diversity and Compliance.

The City should certainly also consider the acceptance of reciprocal certification from various agencies, and should streamline the process as much as possible, making it as easy and transparent as possible to become certified, while simultaneously ensuring that the process is robust enough to filter out firms that do not legitimately qualify for the benefits of the program. Our primary concern is that the City of Memphis control its own process and maintain its own database of certified firms.

### RECOMMENDATION 7: BONDING AND INSURANCE ISSUES

The City should review its bonding and insurance requirements in an effort to reduce the burden on small, minority and woman-owned businesses. Our review indicates that many of the City's insurance requirements in particular are higher than many other jurisdictions. A comprehensive effort should be undertaken to ensure that the City is not requiring limits which are higher than necessary to protect the City's interests.

### RECOMMENDATION 8: ACCOUNTABILITY OF EXISTING SUPPORTIVE SERVICES PROGRAMS

The City currently financially supports various non-profit agencies that provide supportive services to MWBEs and other small businesses throughout the City. GSPC recommends that these organizations become more accountable to the City for the progress and results of their programs. Specifically, GSPC recommends that each non-profit receiving funding from the City of Memphis develop an annual plan in conjunction with the staff of the Office of Business Diversity to set measurable objectives. Benchmarks should be set which result in quarterly reports on progress towards meeting the objectives.

## A. CONCLUSION

It is important that the City of Memphis is committed to provide equal access to its procurement process for all diverse businesses. However, although the City's EBO Program appears to have made an impact on subcontracting, the majority of the City's contracts do not utilize subcontractors, possibly due to relatively small contract size. The small average contract award should have provided more opportunities for MWBEs to perform as prime contractors, but it has not. In fact, MWBE participation as prime contractors has declined overall during the Study Period as compared to the results of the previous disparity study.

As a result, GSPC has made recommendations which will assist the City in ensuring inclusion. The process of improving the program has already begun with some new changes already implemented by the current administration through the newly developed Office of Business Diversity and Compliance. If the recommendations made above are implemented along with the modifications already made, the impact of these changes will increase equal access to business opportunities for minority and women owned firms.